

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETRIOUS KENYATTA HARRIS,

Defendant-Appellant.

UNPUBLISHED

November 15, 2007

No. 272681

Oakland Circuit Court

LC No. 2005-203453-FH

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for one count of possession with intent to deliver more than 50 but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii); one count of possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii); one count of possession of a firearm by a felon, MCL 750.224f; and three counts of possession of a firearm during the commission of a felony, MCL 750.227(b). Defendant was sentenced as a habitual offender, second offense, MCL 769.10, to 10 to 30 years' imprisonment for possession with intent to deliver cocaine; one to six years' imprisonment for possession with intent to deliver marijuana; one to seven years' imprisonment for possession of a firearm by a felon; and two years imprisonment for each of the three counts of felony-firearm. We affirm.

Defendant first argues that the prosecutor failed to produce sufficient evidence at trial for a rational jury to find beyond a reasonable doubt that he possessed the controlled substances upon which his convictions were based. We review challenges to the sufficiency of the evidence de novo, and in a light most favorable to the prosecution, to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). Circumstantial evidence and the reasonable inferences that arise therefrom can constitute sufficient proof of the elements of a crime beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

To convict a defendant of possession of a controlled substance with intent to deliver, the prosecution is required to show that (1) defendant knowingly possessed a controlled substance, (2) defendant intended to deliver the controlled substance to someone else, (3) defendant lacked authorization to possess the controlled substance, and (4) the substance was the controlled substance it was purported to be, within the specified weight. MCL 333.7401(2)(a)(iii); MCL

333.7401(2)(d)(iii); *People v John Williams*, 268 Mich App 416, 419-420; 707 NW2d 624 (2005).

Defendant's primary focus is on the lack of evidence of possession. Proof of possession of a controlled substance requires a showing that a defendant exercised dominion or right of control over the drug, combined with a defendant's knowledge of the drug's presence and character. *People v Meshell*, 265 Mich App 616, 621; 696 NW2d 754 (2005). Possession may be either actual or constructive, and may be joint or exclusive. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). A defendant's mere presence where controlled substances were found is not sufficient to establish possession; an additional connection between the defendant and the controlled substances must be established. *Id.* at 520. Constructive possession exists where the circumstances indicate a sufficient nexus between the defendant and the controlled substance. *Id.* at 521.

Here, the prosecutor presented evidence that, on January 23, 2003, the police observed a car registered to defendant in the driveway of a home where a search warrant was subsequently executed. Defendant admittedly resided at the home on the date of the search. At the home, the police found a duffel bag containing approximately 119 grams of cocaine, and 363 grams of marijuana, and a loaded nine-millimeter handgun, in a bedroom located in the basement of the house. In the same bedroom where the drugs and gun were recovered, the police found two measuring cups with cocaine residue on them, a set of digital scales, "male" clothing items in defendant's size,¹ and two "proofs of residency" with defendant's name on them, including a "State of Michigan certificate title for a vehicle" bearing defendant's name. The proofs of residency were found within four inches of the measuring cups. The presence of defendant's personal papers and clothes, in the bedroom where he appeared to reside, near the controlled substances and handgun, was sufficient indicia of control over the drugs for a rational jury to find beyond a reasonable doubt that defendant possessed them. While defendant presented witnesses who claimed that he did not sleep in the bedroom where the contraband was found, all conflicts in the evidence must be resolved in favor of the prosecution when presented with a challenge to the sufficiency of the evidence. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant next argues that the trial court abused its discretion by allowing Detective Perry Dare to testify as an expert, and to specifically testify that defendant fit the profile of a drug dealer and resided in the bedroom where the contraband was found. Although we generally review the admission of expert testimony for an abuse of discretion, *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004), because defendant failed to timely and specifically object, we review this issue for plain error that affected defendant's substantial rights. *Carines, supra* at 763.

The record does not reveal that Dare testified that defendant fit a drug profile, or that the prosecutor used a profile as substantive evidence of defendant's guilt. "Drug profile" evidence

¹ The evidence supported that the clothes in the bedroom were proportionate to defendant's size and not the size of the only other male residing in the house.

has been defined as “essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit, such as the use of pagers, the carrying of large amounts of cash, and the possession of razor blades and lighters in order to package crack cocaine for sale.” *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999). Drug profile evidence is not admissible as substantive evidence of guilt. *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995). An expert witness is not permitted to opine “that, on the basis of the profile, the defendant is guilty,” or to “compare the defendant’s characteristics to the profile in a way that implies that the defendant is guilty.” *People v Charles Williams*, 240 Mich App 316, 321; 614 NW2d 647 (2000). Expert testimony is admissible, however, “to aid the jury in understanding evidence in controlled substance cases” and “to explain the significance of items seized and the circumstances obtaining during the investigation of criminal activity.” *Murray*, *supra* at 53. Here, Dare described the significance of the measuring cups, razor blade, digital scales, and sandwich bags in the process of controlled substance distribution. This evidence was admissible as circumstantial evidence that defendant intended to deliver the controlled substances. *Wolfe*, *supra* at 524. Dare never testified that defendant fit the profile of a drug dealer. It was not plain error for the trial court to allow the challenged portion of Dare’s testimony.

Defendant additionally argues that the trial court abused its discretion by allowing Dare to opine about defendant’s innocence or guilt. Specifically, defendant challenges Dare’s testimony that defendant occupied the basement bedroom, arguing that because the drugs were found there, Dare improperly expressed an opinion on defendant’s guilt. See *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). However, Dare did not testify that he believed defendant was guilty, that defendant possessed the controlled substances at issue, or that defendant or his witnesses lacked veracity. Instead, Dare merely summarized the evidence supporting his conclusion that defendant resided in the basement bedroom where the controlled substances were found. On the record before us, we do not conclude that it was plain error to allow the testimony.

Next, defendant argues that the trial court abused its discretion by denying his motion for a mistrial. We review a trial court’s decision on a motion for a mistrial for an abuse of discretion. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). An abuse of discretion occurs where a trial court’s decision falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A trial court should grant a mistrial only when there is an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). Prejudice is shown when the trial court’s ruling is so grossly in error that it deprives the defendant of a fair trial or amounts to a miscarriage of justice. *Wells*, *supra* at 390.

Defendant’s theory of the case was that he did not occupy the bedroom where the drugs and gun were found. He produced three witnesses at trial to support this claim. Defendant also attempted to show that the police found “proof of residency” documents, labeled defense Exhibits A and B, belonging to another man in the basement of the house. Exhibit A consisted of an MCI telephone service cancellation warning addressed to another resident of the house; Exhibit B consisted of a receipt from a business named “Anthony’s Custom Tailoring Alterations for Ladies and Men” for a tuxedo purchased by that same resident. At trial, Dare testified that the documents were “absolutely not” found in the bedroom located in the basement of the house,

and that the documents were “accidentally placed with the proofs” for the instant case. Dare acknowledged that, at the preliminary examination, he testified that the documents were found in the bedroom and had defendant’s name on them, and testified at trial that this preliminary examination testimony was in error. And, Dare admitted that he did not inform defendant’s trial counsel until after the trial began that the documents referred to as defense Exhibits A and B were mistakenly added to the bag containing evidence for the instant case.

On the record before us, however, we hold that defendant cannot show that Dare’s testimony deprived him of a fair trial. Although defense counsel relied on the documents to support his defense, the fact that the documents were not found there was fully explained at trial, and Dare accepted the fault. In his closing argument, defense counsel used Dare’s inconsistent testimony to argue that Dare was mistake prone, and that he likely overlooked evidence at the scene that would have exonerated defendant. In addition, this assisted the defense, and defendant’s defense remained viable in light of his live-witness testimony. Further, the trial court instructed the jury that the statements and arguments of the lawyers were not evidence, and could not be used to determine the outcome of the trial. Jurors are presumed to follow a court’s instructions. *Matuszak*, *supra* at 55; *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Defendant next argues that he was denied a fair trial by cumulative error. Defendant's argument that the cumulative errors deprived him of a fair trial is without merit, because no errors were found with regard to any of the above issues. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Christopher M. Murray